THE WISCONSIN PLAN FOR THE INITIATIVE AND REFERENDUM

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The history of American political institutions shows no more remarkable development than the extension of the movement for direct legislation. The close of the nineteenth century saw but one state whose basic law provided means of statutory enactment or even of constitutional amendment by direct vote of the people. The referendum was looked upon as a foreign institution and reports of its operation in Switzerland suggested its infrequent use, and then with no flattering results. Public opinion since then has moved apace. Scarcely a year has passed without marking the accession of some state to the referendum list until nearly half of our commonwealths have accepted this method of state-wide legislation or have started proceedings to amend their constitutions to bring about this end. Hardly a fourth of our states remain among those denying its use even to cities and other minor civic divisions. No longer may the initiative and referendum be regarded as fads, they are burning political issues and have already come to exert no inconsiderable influence in even our national campaigns. The closest students of our political institutions recognize in them elements of strength, and attention is now being directed toward their better development that they may form rational components of our political organization.

The causes which have given rise to this extraordinary movement, involving fundamental changes in our plan of government, merit consideration. They are based upon a distrust of the legislature as an institution for the enactment of statute law. That our representative bodies have proved weak instruments for the work for which they were designed, is not questioned. The plan upon which they have been organized seems admirable—that the people's representatives should gather each year or two and make such laws as in their judgment the condition of the state demands. Coming from all portions of the state and from diverse walks in life, they might be presumed to know the actual needs of the state and to be in a position

to foretell what effect proposed laws would have on their respective constituents and *en bloc* upon the general welfare of the state. Such is the plan of "representative government" which many fear is seriously menaced by the extension of the initiative and referendum. Had the actual development of our plan of government followed the course outlined by its founders, there would have been little demand for a more popular participation in law making. But in nearly all stages of its work the legislative plan has revealed serious weaknesses. In the election of representatives the strongest and ablest men of the community have not been selected, and the business of the session has become so onerous as to make adequate consideration of measures almost impossible. It has become a popular impression that private, rather than public motives frequently influence the position of the people's representatives, and that votes are determined with a view to the furtherance of private corporate and financial interests rather than the interests of the state as a whole. Dissatisfaction with the legislative product has led to a popular distrust of the law-making bodies and a consequent movement for curtailing their power. This was first evidenced in the extended scope of state constitutions which limited more and more closely the power of the people's representatives until, in some few instances, scarcely enough power was left for performing their most elementary functions. The increase in constitutional provisions has, through the power of statutory interpretation, transferred in no inconsiderable degree this strength to the judiciary. The restriction of legislative functions has not been confined to constitutional limitations, but has found expression in an extraordinary demand for popular participation in law making.

The plan for the initiative and referendum is almost ideal in the simplicity of its design. The electorate is looked upon as comprising the members of a great assemblage. Whatever laws are thought advisable are proposed by a given proportion of the community and presented at the election in the form of bills on suggested constitutional changes. If the people adopt these proposals by their vote they become laws of the state, otherwise they fail. Similarly a statute enacted by the legislature may be proposed for rejection by a prescribed percentage of the people and its ultimate fate is determined by their vote. This plan is well calculated to prevent the evil at which it is aimed. Corruption of the legislature receives

little encouragement when laws passed through the legislature with considerable effort and expense may be annulled by an adverse vote of the people.

It is not contemplated that the initiative and referendum will to any considerable extent perform the functions of the legislature. They are looked upon as corrective devices to be invoked when the legislature fails to heed popular demands. The most usual form, however, provides for their use as entirely separate institutions. While their advocates see in them means of legislative improvement, the initiative is entirely independent of the representative body. Reform is effected through the power of removing inducements for legislative manipulation by providing for the rejection of unpopular measures or the passage by a plebiscite of better laws. There are, however, a number of steps which have come to be looked upon as essential elements in the construction of adequate statute law, for which the initiative as it has existed, makes no provision. The drafting of legislative measures is a complicated project not only as respects the technique of the bill itself, but more particularly with reference to its subject matter. The first of these essentials has received too little consideration both with respect to measures to be presented to the legislature and those for a referendum vote. Considerable progress has been made in recent years in the betterment of the arrangement of our statutes. Official bill-drafting departments, patterned after the English prototype, have been installed in a number of our state legislatures and will undoubtedly soon be provided for congressional use. Legislative rules have prescribed with increasing minuteness the form bills must take, and measurable progress has been made in the development of the science of formulating statutes in such a way that the ideas of those proposing measures may be couched in clear and precise language, expressing in no uncertain terms the real concept of its originators. Constitutional provisions must be carefully regarded in order to provide as little ground as possible for litigation and for judicial construction. That these features may not accompany the initiative method of proposing statutes, no one will long contend. There is no reason why the services of the state bill-drafting department might not be at the disposal of those with projects to present, and the rules and customs which are enforced by the legislature might be observed by the initiators. The plan of the direct initiative does not, however, require

this course and those proposing bills to the voters are not as a rule so experienced in bill drafting and in formulating their projects as are the members of the legislature, nor are the voters so well qualified by experience to pass on the measures submitted as are the legislators. To be sure this position is not conceded by all. The picture of the conscious voter studiously devouring the official text-book and the discussions which should fill the public press, arguing the issues with his neighbor or debating them in the local schoolhouse is shown as representing the modern type of lawmaker. In a contrasting position is seen the careless Solon voting in rapid succession, in the closing days of a hilarious session, upon measures he has scarcely even read. That both pictures are overdrawn need hardly be suggested. It is well known that electors cannot be relied upon to give full consideration to proposals upon which they must vote and that the judgment of the major portion is formulated upon a hasty and uncritical reading of the bill itself. This has had an influence upon bill drafting which might easily have been anticipated. Measures are often couched in terms which will curry popular favor and the real purport of the bill is sometimes hidden in portions of the measure where the casual glance will not reveal it. The tendency to confusion in statutory construction with the vastly increased danger of placing upon the courts increased legislative functions is perhaps as reprehensible as the open deceit upon which the practice is based.

But it is to the content rather than the form of the bills that more serious criticism should be directed. It should be the purpose of legislation to meet the needs of the state in the most adequate fashion. How this may be best accomplished is, of course, a matter upon which opinions will differ greatly, but in order to take advantage of such discussion as may be aroused, some plan must be devised which will secure as wide criticism of measures as is possible and which will admit of amendments to the original project in order to improve obvious weaknesses. Opportunity for such procedure is afforded by the legislative committee hearing where measures are attacked by both the friends and enemies of the project. The criticisms of the latter are as a rule the more valuable and such weaknesses as the hearings disclose may then receive consideration. Should the objections prove fundamental, no further course on the measure should be attempted. If but merely incidental, the bill should be so amended as to include proper changes. With

the exception of the Wisconsin plan, this has not been a feature of any initiative project yet proposed. The usual form of the initiative provides no opportunity for changes from the time the petition is filed until the final vote. Even where the plan contemplates the measures going first to the legislature for approval no provision is made for amendments, but should weaknesses be revealed the legislature is allowed the empty privilege of incorporating such changes in a separate bill which is sent to the electorate in competition with the initiated project. True, conscious and commendable efforts have been made in direct legislation states to lessen these difficulties. Bills are referred to friends of the project and the benefit of their criticism is sought. In some instances bills have been published and submitted to various authorities throughout the country for criticism. This is a valuable custom and has been followed with profit in states with the referendum and in other states as well. It does not, however, provide the direct criticism, especially from its foes, which the committee plan supplies. The plan is submitted at too early a time, concrete projects are not yet presented those opposed to the measure are either not consulted or show the matter but indifferent attention. Its final shape is given by a few whose convictions have long ago been formulated and who weigh the adverse criticisms with no judicial mind. From the time the first initiative signatures are secured until the final vote, not the slightest change is admissible. The original concept of the referendum differed widely from this. Rittenhausen proposed popular gatherings for the discussion of all details of measures with an opportunity to reject unpopular sections before the final vote.

The advocates of the direct initiative submit that its true function is to act as an emergency measure, a reference of matters upon which fairly concrete opinions have been formulated, that its use would be confined to measures of greater import and that other matters might well be cared for through legislative channels. Upon such a plan only can the referendum be expected to operate with any satisfaction. The people are not to be bothered with countless proposals of minor importance with which they have no immediate concern. Only important measures can command sufficient attention to reach an intelligent vote. But is it only for measures of minor consequence that the initiative in this form is competent to act. More important and far-reaching measures demand a careful study

and construction for which this method of law-making affords no facilities. Nor has its use been confined in actual practice to the larger measures. Local and minor bills have been referred to the people with the result that more important issues have been clouded.

The difficulty with respect to the use of the initiative and referendum has been that too much has been expected of them and too little care has been directed toward so fitting them into our political system that our institutions as a whole will form a harmonious plan. It was an attempt to adapt the initiative to the task for which it was designed and to make it conform to our present political structures, to improve the institutions now existing, and at the same time to secure the obvious merits of this device which led to the formulation of the Wisconsin plan. The primary design of the initiative is to provide a means whereby the people may vote on measures which the legislature refuses to sanction. While it is the avowed plan of the advocates of the direct initiative that it shall be used only upon the failure of the legislature to act, yet its usual form gives that body no opportunity to sanction the proposals. The bill goes directly from the initiators to the people. The modification of the Swiss plan provided for in Maine obviates this difficulty by providing that proposals must be first submitted to the legislature and are to be referred to the people only upon failure to secure action through this channel. This is a great improvement over the direct initiative inasmuch as it places to the advantage of the initiated project all the legislative devices in the way of hearings, discussion and publicity which attend other bills. Its weakness lies in the fact that little opportunity is here afforded for taking advantage of criticisms which appear upon legislative consideration. The initiative bill is unamendable and the only way provided for securing desired changes lies in their incorporation in a bill of legislative origin. The people are then called upon to decide between the measures submitted to them—a task frequently too difficult for them to handle with the information at their disposal and the time they are willing to devote to it.

The Wisconsin plan, quoted in full in the appended note,[1] requires

[1] Joint Resolution to amend section 1, of article IV of the constitution, to give the people the power to propose laws and to enact or reject the same at the polls, and to approve or reject at the polls any act of the legislature; and to create section 3, of article XII of the constitution, providing for the submission of amendments to the constitution upon the petition of the people.

Resolved by the Assembly, the Senate concurring, That section 1, of article IV of the constitution, be amended to read:

SECTION 1. *1.* The legislative power shall be vested in a senate and assembly, *but the people*

no petition to present measures to the legislature. Bills may be submitted for consideration by any member in the way now provided, and this right is protected in the proposed amendment. Thus all the machinery and procedure now provided for the consideration

reserve to themselves power, as herein provided, to propose laws and to enact or reject the same at the polls, independent of the legislature, and to approve or reject at the polls any law or any part of any law enacted by the legislature. The limitations expressed in the constitution on the power of the legislature to enact laws, shall be deemed limitations on the power of the people to enact laws.

2. a. Any senator or member of the assembly may introduce, by presenting to the chief clerk in the house of which he is a member, in open session, at any time during any session of the legislature, any bill or any amendment to any such bill; provided, that the time for so introducing a bill may be limited by rule to not less than thirty legislative days.

b. The chief clerk shall make a record of such bill and every amendment offered thereto and have the same printed.

3. A proposed law shall be recited in full in the petition, and shall consist of a bill which has been introduced in the legislature during the first thirty legislative days of the session, as so introduced; or, at the option of the petitioners, there may be incorporated in said bill any amendment or amendments introduced in the legislature. Such bill and amendments shall be referred to by number in the petition. Upon petition filed not later than four months before the next general election, such proposed law shal be submitted to a vote of the people, and shall become a law if it is approved by a majority of the electors voting thereon, and shall take effect and be in force from and after thirty days after the election at which it is approved.

4. a. No law enacted by the legislature, except an emergency law, shall take effect before ninety days after its passage and publication. If within said ninety days there shall have been filed a petition to submit to a vote of the people such law or any part thereof, such law or such part thereof shall not take effect until thirty days after its approval by a majority of the qualified electors voting thereon.

b. An emergency law shall remain in force, notwithstanding such petition, but shall stand repealed thirty days after being rejected by a majority of the qualified electors voting thereon.

c. An emergency law shall be any law declared by the legislature to be necessary for any immediate purpose by a two-thirds vote of the members of each house voting thereon, entered on their journals by the yeas and nays. No law making any appropriation for maintaining he state government or maintaining or aiding any public institution, not exceeding the next previous appropriation for the same purpose, shall be subject to rejection or repeal under this section. The increase in any such appropriation shall only take effect as in case of other laws, and such increase, or any part thereof specified in the petition, may be referred to a vote of the people upon petition.

5. If measures which conflict with each other in any of their essential provisions are submitted at the same election, only the measure receiving the highest number of votes shall stand as the enactment of the people.

6. The petition shall be filed with the secretary of state and shall be sufficient to require the submission by him of a measure to the people when signed by eight per cent of the qualified electors calculated upon the whole number of votes cast for governor at the last preceding election, of whom not more than one-half shall be residents of any one county.

7. The vote upon measures referred to the people shall be taken at the next election occurring not less than four months after the filing of the petition, and held generally throughout the state pursuant to law or specially called by the governor.

8. The legislature shall provide for furnishing electors the text of all measures to be voted upon by the people.

9. Except that measures specifically affecting a subdivision of the state may be submitted to the people of that subdivision, the legislature shall submit measures to the people only as required by the constitution.

Be it further resolved by the assembly, the senate concurring, That article XII of the constitution, be amended by creating a new section to read:

Section 3. 1. a. Any senator or member of the assembly may introduce, by presenting to the chief clerk in the house in which he is a member, in open session, at any time during any session of the legislature, any proposed amendment to the constitution or any amendment to any such

of measures are available for those which may be later subjected to popular vote. Amendments may be suggested and voted on and the advantages now given legislative proposals are ready for use. Should the legislature enact a measure which is generally satisfactory, no further action of course is necessary. Should it refuse to do so, however, or should a law be passed in an unsatisfactory form, a petition may be filed in the usual way asking that any specified bill which has been presented to the legislature be referred to the people together with any amendments to it which have been proposed in the legislature. Just as the referendum provides a means whereby unpopular laws may be rejected by a plebiscite, so the initiative in this form provides opportunity for affirmative action when the representative body has failed to voice the people's will.

Under the rules of the Wisconsin legislature, this body never loses control over measures which have been introduced. Bills are referred to committees which are expected to examine the proposals and are required to report them back for action. Thus every

proposed amendment to the constitution; provided, that the time for so introducing a proposed amendment to the constitution may be limited by rule to not less than thirty legislative days.

b. The chief clerk shall make a record of such proposed amendments to the constitution and any amendment thereto and have the same printed.

2. Any proposed amendment to the constitution shall be recited in full in the petition and shall consist of an amendment which has been introduced in the legislature during the first thirty legislative days, as so introduced, or, at the option of the petitioners, there may be incorporated therein any amendment or amendments thereto introduced in the legislature. Such amendment to the constitution and amendments thereto shall be referred to by number in the petition. Upon petition filed not later than four months before the next general election, such proposed amendment shall be submitted to the people.

3. The petition shall be filed with the secretary of state and shall be sufficient to require the submission by him of a proposed amendment to the constitution to the people when signed by ten per cent of the qualified electors, calculated upon the whole number of votes cast for governor at the last preceding election of whom not more than one-half shall be residents of any one county.

4. Any proposed amendment or amendments to this constitution, agreed to by a majority of the members elected to each of the two houses of the legislature, shall be entered on their journals with the yeas and nays taken thereon, and be submitted to the people by the secretary of state upon petition filed with him signed by five per cent of the qualified electors, calculated upon the whole number of votes cast for governor at the last preceding election of whom not more than one-half shall be residents of any one county.

5. The legislature shall provide for furnishing the electors the text of all amendments to the constitution to be voted upon by the people.

6. If the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become a part of the constitution, from and after the election at which approved; provided, that if more than one amendment be submitted they shall be submitted in such manner that the people may vote for or against such amendments separately.

7. If proposed amendments to the constitution which conflict with each other in any of their essential provisions are submitted at the same election, only the proposed amendment receiving the highest number of votes shall become a part of the constitution. (Joint Resolution, No. 74, Laws of Wisconsin, p. 1142.)

proposal receives definite approval or rejection at the hands of the legislature itself. No bill may die in committee. It may be that a single committee report recommends the indefinite postponement of a large number of bills which are killed by the acceptance of the report, but opportunity is always given for separate action on measures when a special vote is requested. So the committee performs the function for which it was designed, investigating measures more minutely and carefully than the legislative body itself finds possible, but never depriving the houses themselves of full control over all projects of legislation. Much has been said in disparagement of our American committee system because of the abuses which have too frequently attended it, but no one has seriously contemplated its abolition, because without it parliamentary procedure would soon become clogged. But the committee is no more essential to the legislature in its law-making function than is the legislature to the people. In fact, there is a close analogy between the two, and the legislature may well be looked upon under the Wisconsin system as the people's committee for law-making. To them all projects are referred for analysis and examination and the people have means at their disposal for as complete control over the legislature as that body has over its own committees. Should the legislature enact a measure of which the people disapprove, a referendum petition will present it for rejection at the polls, but on the other hand, any measure which the legislature has refused to pass may, by the filing of a similar petition, be placed upon the ballot for the people's approval either in the form in which it was originally introduced or with such amendments submitted during its legislative consideration as the petitioners designate.

A similar course is provided for constitutional amendments except that a larger petition is required to effect their submission. The regular method of constitutional amendment in Wisconsin involves the approval of two successive legislatures and the subsequent ratification by the people. Should the legislature refuse approval to any constitutional amendment submitted, a ten per cent petition will bring it before the people with any designated amendments which were introduced in the legislature. After an amendment has passed one legislature a five per cent petition will be as effective as the approval of the second legislature to place it on the ballot.

With respect to the referendum, certain new features are to be found which have since been incorporated in later proposals. The general effect of the referendum petition upon a legislative act is to suspend its operation until sanctioned by a popular vote. The possible inconvenience and danger which might result from any delay attendant upon the immediate operation of some emergency measure has resulted in the almost universal provision that such laws should go into immediate operation and subsequent rejection at the polls should act as a repeal. It is customary to require a larger vote in the legislature to stamp a law as an emergency measure. To this usual provision the Wisconsin amendment adds appropriation laws. To quote the amendment: "No law making an appropriation for maintaining the state government or maintaining or aiding any public institution, not exceeding the next previous appropriation for the same purpose, shall be subject to rejection or repeal under this section. The increase in any such appropriation shall only take effect as in the case of other laws, and such increase, or any part thereof, specified in the petition may be referred to a vote of the people upon petition."

Appropriation measures are not of a character to be satisfactorily carried to a large constituency. The need of funds for public purposes may be demonstrated to a group or to those who can be induced to seriously consider such questions, but it is difficult to secure increased taxes from the people for projects from which no immediate financial benefit is assured. But other considerations make such a plan as this imperative. The referendum petition delays the taking effect of a law until the popular vote—sometimes eighteen months in the future. To allow a handful of the people to withhold funds for a needed government service for such a time is an obnoxious form of minority control. The Wisconsin plan, therefore, makes possible a referendum on increases in appropriations or new charges, but allows the conduct of government to proceed uninterrupted. Wisconsin will thus be saved serious inconvenience which has elsewhere accompanied the use of this agency. But the power of the people is not limited even with respect to old appropriations. Funds may be cut off entirely from any state service or institution by a law enacted by the people through initiative petition.

The plan as outlined has not as yet become a part of the Wisconsin constitution. It has been accepted by one legislature and yet requires sanction at the next session and subsequent ratification

at the polls. It has not received the unqualified endorsement of the leaders of the direct legislation movement throughout the country. We have been told that this is not the initiative at all but merely a development of the referendum to make it apply to bills as well as laws—to give a positive as well as a negative force. Possibly this is true, but names are not important, and if there is here found an instrument which accomplishes the same results it matters little what title is given it. More consequential objections come from those who see in it a limitation on the popular control of law-making which the more usual form provides. They reason that the basic principle of direct legislation is to act as a check on the legislature, to reject vicious laws and enact those which the law-makers refuse to pass. To place this instrument in the hands of those whom we wish to regulate is looked upon as fatal. But wherein lies the danger? What could the most recalcitrant legislature do with respect to a measure which they might bitterly oppose to thwart the wishes of the people of the state? Might they forbid the introduction of bills on matters which they opposed? The amendment provides that any member may present any bill, or any amendment to such bill, at any time during the first thirty days of a session. Would the members be so enleagued against the plan that none could be found to father it? Slight chance would there be for the passage of a law by the people were it impossible to find even one legislator who would consent to present it "on request."

But a more fundamental query is raised by the objection that the introduction of measures into the legislature does not assure them the careful consideration which the advocates of this method deem essential. Attention is called to the multitude of proposals and the limited time of the sessions, and the conclusion is suggested that the limitation of the initiative to measures which have been introduced will not insure any careful consideration of measures upon which the people will be asked to pass. Such criticism misses the element which forms the greatest contribution of the Wisconsin plan. The initiative will not be called upon when legislative action may be secured, the latter is the quicker, less expensive and easier way. Attention will therefore be closely drawn to those measures in the session upon which a later vote may be requested. Those of sufficient interest to make possible their later submission will be carefully scrutinized and each representative will be prepared to defend his vote upon it before his constituents. In practice it may well be expected to be confined to

measures upon which some state-wide interest has been aroused. Platform pledges, administration measures and issues supported by various organizations of the state will constitute the issues. It is not to be expected that the initiative will be frequently invoked, but the possibility of its employment will exert a wholesome influence upon the legislative product. True, there are many bills presented each session, but those of such importance as to make the use of the initiative at all possible are not numerous and, with a later campaign contemplated, the advantage of publicity and discussion while the bill was pending before the legislature would hardly be overlooked.

They are undiscerning students of political science who argue there is no demand for direct legislation. The rapid rise and spread which has attended this movement would not have resulted unless directed against real evils in our governmental organisms. That such exist none will deny. The question is whether direct legislation provides the surest remedy. There must be popular control of our political institutions in all their forms, and only such laws should be enacted as meet with public approval. It is to the legislature that we must look primarily for statutory enactment. Should it fail to embody in the form of law, principles demanded by the people, resort may be had to the initiative. Whether or not laws may be satisfactorily secured through the direct vote of the people depends upon the importance of the issues, their number and the popular interest which they arouse. Like every other group, the electors must be organized for concerted action, but upon clear-cut issues, where public opinion has been focused, the ballot-box may well be looked to for a final determination. To deny its use would be irrational, to abuse it, unwise. The initiative is to be so adjusted to our organizations as to form with the legislature a proper method of statutory enactment. For this purpose the Wisconsin plan seems well adapted. Here is a method through which the people by their own power may pass laws or constitutional amendments which have been proposed in the legislature and which the legislature has refused to sanction. Its greatest value will lie in the improvement it may be expected to exert upon that body through this potential. By the adoption of this amendment it is believed the direct legislation principle has been well adapted to continue the course which the State of Wisconsin has so successfully pursued—the development of strong and effective institutions of government subject to the control of the popular will.